

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In The Matter of)

Petition for Rulemaking)

To Establish A Low Power AM Radio Service)

RM No. 11287

To: Office of the Secretary

**COMMENTS OF
ALASKA BROADCASTERS ASSOCIATION
MISSISSIPPI ASSOCIATION OF BROADCASTERS
RADIO BROADCASTERS ASSOCIATION OF PUERTO RICO**

The Alaska Broadcasters Association, the Mississippi Association of Broadcasters, and the Radio Broadcasters Association of Puerto Rico hereby submit the following comments in response to the Petition for Rulemaking to Establish a Low Power AM Radio Service (the "Petition") filed by the Amherst Alliance, the Michigan Music Is World Class! Campaign, the LPAM Network, Don Schellhardt, Esq., and Nickolaus E. Leggett (the "Petitioners"). The Petition proposes a new commercial low power AM ("LPAM") radio service, which would impose massive new burdens on the Commission's resources. The Petition, however, utterly fails to demonstrate why such a service is needed or how the public would benefit from such a service. Moreover, almost all of the proposals set forth in the Petition are unlawful, unworkable, or both. Finally, the proposed LPAM service is certain to raise interference issues with respect to existing AM services. For the forgoing reasons, which are further described herein, the Commission should dismiss the Petition.

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I. Introduction

The Petition proposes a new commercial low power AM radio service that is intended to duplicate the services of – and directly compete with – existing commercial AM and FM radio services. To provide this new class of service, the Petitioners propose an entirely new system of issuing licenses, new eligibility criteria, new ownership rules, and new technical rules.

Specifically, the Petition asserts that LPAM licenses should be available to individuals and “small businesses,” but not to “established broadcasters.”¹ Applicants for new LPAM stations would be required to reside within 25 miles of any LPAM station owned by the applicant, although the Petitioners assert that there should be no minimum length of residency required.² LPAM licensees would be permitted to own up to 12 LPAM stations nationwide, but only one in “any given Metropolitan Statistical Area (MSA), any Metropolitan District of any MSA and/or any Micropolitan Area.”³

The Petition adamantly insists that the new LPAM service must not be subject to statutory auction requirements.⁴ Instead, mutually exclusive applications for LPAM stations would be resolved in the first instance by operation of a new system of “bonus points” awarded on the basis of the applicant’s proposed programming. Specifically, points would be “awarded for proposing to air worthwhile programming of a nature that is not found on the dial in the area being served.”⁵ If the mutually exclusive applicants have an equal number of points, the Commission would be required to decide who will receive the license on a case-by-case basis under a “public interest” standard.⁶ The Petition also proposes a variety of technical rules for the new LPAM service. As the Petitioners could not agree amongst themselves as to appropriate

¹ Petition at 5.

² *Id.*

³ *Id.*

⁴ *Id.* at 6.

⁵ *Id.* at 5.

⁶ *Id.* at 7.

power ceilings and channel spacing requirements, they presented the Commission with two alternative proposals, along with a critique of a third proposal.⁷

II. A New Commercial LPAM Service Will Not Serve the Public Interest

At the outset, it must be noted that, in its Order creating the low power FM ("LPFM") service, the Commission previously considered and rejected the idea of creating a low power AM service due to the extent of congestion within the AM band and the probability that LPAM stations would cause significantly higher levels of interference.⁸ The Commission also considered and rejected the idea of creating a commercial low power radio service. The Commission clearly stated that, "[w]hile we have considered the entrepreneurial opportunities that low power radio stations might create, we nonetheless conclude that a noncommercial service would best serve the Commission's goals of bringing additional diversity to radio broadcasting and serving local community needs in a focused manner."⁹ The Petition has not demonstrated any change in circumstances since the Commission's decisions in that Order that would justify changing the Commission's conclusion that a commercial LPAM service would not serve the public interest. On this basis alone, the Petition should be dismissed.

A. A New Commercial LPAM Service Would Impose Heavy Public Costs

In addition, the new LPAM service proposed in the Petition would create enormous new burdens for the Commission. The Petition proposes an entirely new class of service with eligibility, ownership, and technical restrictions unlike any currently in effect. As such, extensive new rulemaking proceedings would be required. Moreover, as the Petitioners admit, Congressional legislative action would be needed to clear the way for "auction free" LPAM

⁷ *Id.* at 8-11.

⁸ *Creation of Low Power Radio Service, Report and Order*, 15 FCC Rcd 2205, 2228 (2000) ("LPFM Order"); *Creation of Low Power Radio Service, Notice of Proposed Rulemaking*, 14 FCC Rcd 2471, 2478 (1999) ("LPFM NPRM").

⁹ LPFM Order at 2213.

licensing.¹⁰ In addition, the governance of a new class of service would demand substantial administrative resources, even before the inevitable wave of interference complaints is taken into consideration. In light of the substantial burdens its proposals would impose, the Petition could be expected to demonstrate commensurately substantial benefits that would flow from the creation of a commercial LPAM service. Petition, however, did not provide any evidence whatsoever that a commercial LPAM service would provide any benefit to the public.

B. A New Commercial LPAM Service Would Provide No New Public Benefits

The Petition claims that LPAM is needed to supplement the low numbers of LPFM stations available in large urban areas.¹¹ The Petition, by way of example, asserts that the Detroit, Michigan, metro market currently has no LPFM stations but could have up to 4 LPAM stations.¹² The Commission, however, previously addressed this concern in the LPFM Order, specifically stating that even if “FM band crowding may preclude or limit LPFM opportunities in certain markets, we are not persuaded that the creation of an AM low power radio service is warranted.”¹³

Moreover, as the Petition itself notes, the proposed LPAM service would not duplicate the noncommercial, community-centered LPFM service.¹⁴ LPAM, as envisioned by the Petitioners, would duplicate *commercial* AM and FM services. As such, LPAM would be a supplement to existing commercial AM and FM services, *not* the noncommercial LPFM service. According to BIA, there are over forty commercial radio stations currently serving the Detroit market.¹⁵ Whatever else the Petitioners may say about Detroit, they cannot claim that it lacks for

¹⁰ As such, it is submitted that the Petition and any Commission action would be premature and beyond the Commission’s present authority.

¹¹ Petition at 12.

¹² *Id.*

¹³ LPFM Order at 2228.

¹⁴ *Id.* at 4.

¹⁵ BIA Financial Network, Inc., *Investing in Radio 2005*, 3rd Ed. (2005).

commercial radio stations. Commercial radio in Detroit, and elsewhere, does not need supplementing by LPAM stations.

The Petition also asserts that mandatory auctions for new station licenses and industry consolidation have produced two negative consequences that LPAM will address. First, the Petition claims that the combination of auctions and media consolidation have somehow caused advertising rates to rise to the point where local businesses are shut out from advertising on radio.¹⁶ This is patently untrue and the Petition does not present any evidence of any kind in support of its claims. To the contrary, a recent Media Bureau Staff Research Paper found that increases in local concentration only modestly increased local radio advertising rates, while increases in national concentration had *no* apparent effect on local radio advertising rates.¹⁷

Even assuming, *arguendo*, that local advertising rates are too high for some local businesses, the Petition does not demonstrate that LPAM stations will solve this problem. As commercial stations, LPAM stations would operate in the same advertising markets as existing commercial radio stations. Although the Petition vaguely argues that LPAMs will have lower operating costs and a “high need for locally generated revenues” (as if existing stations have no such need), it does not demonstrate that LPAM advertising rates will be significantly lower than those of existing stations. Moreover, the Petition ignores factors such as ratings and audience demographics, which are critical in providing value to advertisers.¹⁸ If an LPAM station has virtually no listeners, even cheap ad rates will not provide value to local businesses.

The Petition also claims that the “one-two punch” of auctions and consolidations prohibits small, established broadcasters from adding more stations and prevents newcomers

¹⁶ Petition at 13-15.

¹⁷ Keith Brown and George Williams, *FCC Media Bureau Staff Research Paper: Consolidation and Advertising Prices in Local Radio Markets*, 2002.

¹⁸ See Radio Advertising Bureau, *2004-2005 Radio Marketing Guide and Fact Book*, 2005.

from buying their first radio station.¹⁹ Again, this claim is demonstrably false and the Petition provides no evidence of any kind to support it. To begin with, auctions apply only to new stations. Existing stations are bought and sold at whatever price the buyer and seller may agree. Becoming a broadcaster does not require millions of dollars. Even a casual review of the Commission's CDBS database reveals hundreds of granted assignment applications since the start of 2005, many of which represent sales of existing stations to small or new station owners at prices under \$150,000.²⁰ Moreover, the auction system does not automatically drive the prices of new stations to unattainable levels. In the Commission's recent FM auction, over 10 percent of the auctioned permits were acquired for under \$100,000.²¹

The Petition provides no evidence that a commercial LPAM service would address these alleged harms in ways that existing commercial services cannot. In fact, the Petition fails demonstrate why a commercial LPAM service is needed at all. As such, a new commercial LPAM service cannot possibly justify itself in the name of the "public interest."

III. The Proposals Set Forth in the Petition Are Unsustainable

As described above, the Petition sets forth several proposals concerning licensing of commercial LPAM stations and eligibility for such licenses. Virtually all of these proposal are unlawful, unworkable, or both.

A. Auctions Are Not Optional

The Petition's insistence that a commercial LPAM service be exempted from auctions, for instance, cannot withstand even the slightest scrutiny. The Commission cannot simply waive the auction requirements for a new commercial radio service. Section 309(j)(1) of the Communications Act of 1934, as amended (the "Act"), states that if mutually exclusive

¹⁹ Petition at 15-16.

²⁰ See, e.g., FCC File No. BAL-20040805AAI (sale of WYRO(AM) for \$145,000) and FCC File No. BAL-20041206AAB (sale of WYTH(AM) for \$63,000).

²¹ *FM Broadcast Construction Permits Auction Closes*, Public Notice, Exhibit A, DA 04-3694 (Rel. Dec. 1, 2004)

applications are filed for “any initial license or construction permit ... then the Commission shall have the authority ... to grant such license or permit to a qualified applicant through the use of a system of competitive bidding ...” 47 U.S.C. §309(j)(1). In its Order establishing standards for auctions of broadcast facilities, the Commission plainly stated that, based upon the express language of Section 309(j)(1) of the Act, “auctions are mandatory for all secondary commercial broadcast services (*e.g.*, LPTV, FM translator and television translator services).”²²

As the Petitioners are no doubt aware, the Commission considered and resolved this question when it considered the creation of a commercial LPFM service.²³ Indeed, the fact that a commercial LPFM service would be subject to auctions played some part in the Commission’s rejection of such a service.²⁴ Perhaps for this reason, the Petitioners urge the Commission to issue its proposed rules first, and thereafter urge Congress to exempt the new service.²⁵ The Commission, of course, cannot engage in a massively wasteful rulemaking proceeding to create rules that only will become effective in the virtually impossible event that Congress reverses course on auctions.

B. The Petition’s Alternative Licensing System Would Be Unworkable

Even if the Commission could waive its auction requirements, it could not institute the licensing proposals set forth in the Petition. As described above, the Petition proposes to award licenses on the basis of the proposed programming content of the proposed station. This content-based regulation would not survive First Amendment scrutiny. The Commission cannot be put in the position of awarding licenses based on its evaluation of whether proposed programming is “worthwhile” and sufficiently different from what is being provided by other broadcasters.

²² *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report & Order*, 13 FCC Rcd 15920, 15924-25 (1998).

²³ LPFM NPRM at 2507-08.

²⁴ LPFM Order at 2213, 2257-2258.

²⁵ Petition at 6.

Moreover, it is well-established that the Commission does not consider programming formats in licensing matters.²⁶ Furthermore, the proposed “bonus point” system would not achieve any lasting results. Unless the Petitioners are proposing that the Commission would police the programming of LPAM stations indefinitely, applicants could propose programming likely to win the permit, only to change format after licensing.

The failure of the proposed “bonus point” system would leave the Commission to sort out competing applications on a case-by-case or comparative hearing basis. The petition has no suggestions as to how the Commission would accomplish this task, other than state that it should be pursuant to an undefined “public interest” standard.²⁷ As the Commission determined in the LPFM proceedings, however, comparative hearings “tend to be lengthy, cumbersome, and resource-intensive.”²⁸ Given the lack of public benefit accruing from a commercial LPAM service, the Commission cannot justify the waste of public resources involved with the licensing system proposed in the Petition.

C. The Proposed Eligibility Criteria Are Meaningless

The Petition has only one firm requirement for the new commercial radio service – no established broadcasters allowed.²⁹ Except for that imperative, the Petition is vague as to who might apply for a commercial LPAM license. The Petitioners appear to be caught on the horns of a dilemma: they wish to have the public interest veneer of localism without any requirement to actually be local. Thus, they propose a residency requirement that is suggestive of those applied to LPFM applicants but completely undercut the substance of such a requirement by more than doubling the allowable distance from the community, eliminating the minimum residency

²⁶ See *FCC v. WNCN Listeners Guild*, 450 US 582 (1980).

²⁷ Petition at 7.

²⁸ LPFM Order at 2259.

²⁹ Petition at 5.

requirement, and only requiring applicants to be local to one of the stations they own.³⁰ Thus, an applicant for an LPAM station in Texas could qualify under the proposed residency requirement if the applicant resided within 25 miles of its LPAM station in Alaska or, alternatively, moved within 25 miles of the subject community the day before the application is submitted.

In creating the LPFM service, the Commission noted that its goal was to create “a class of radio stations designed to serve very localized communities or underrepresented groups within communities.”³¹ Without any meaningful eligibility criteria, the Petition fails to demonstrate how applicants for commercial LPAM stations would be any better positioned to serve local needs than licensees of existing commercial stations.

IV. The Addition of LPAM Stations Will Raise Interference Problems

As noted above, the Commission has already considered and rejected the idea of authorizing low power service in the AM band based on interference concerns. As the Commission previously stated, “[t]he interference potential and present congestion in the AM band, where many stations currently experience significant interference and degraded reception, make it a poor choice for a new radio service.”³² For almost twenty years, the Commission has engaged in an ongoing effort to reduce such interference and improve technical service in the AM band.³³ In creating the expanded band AM service, for example, the Commission focused on wider channel separations on the grounds that increased channel separations reduce interference levels.³⁴ We fully agree with the Commission that “introducing low power stations

³⁰ *Id.*

³¹ LPFM Order at 2208.

³² LPFM NPRM at 2478. *See also* LPFM Order at 2228.

³³ *See, e.g.,* FCC Mass Media Bureau, Report on the Status of the AM Broadcast Rules, RM-5532, 1986; Review of Technical Assignment Criteria for the AM Broadcast Service, Notice of Inquiry, 2 FCC Rcd 5014 (1987); Review of Technical Assignment Criteria for the AM Broadcast Service, Report and Order, 6 FCC Rcd 623 (1991) (“AM Order”); Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service, Report and Order, 17 FCC Rcd 19990 (2000).

³⁴ *See* AM Order at 6303-6305.

into any part of the AM spectrum would have a serious negative impact on ... efforts to improve the quality of reception in this band.³⁵

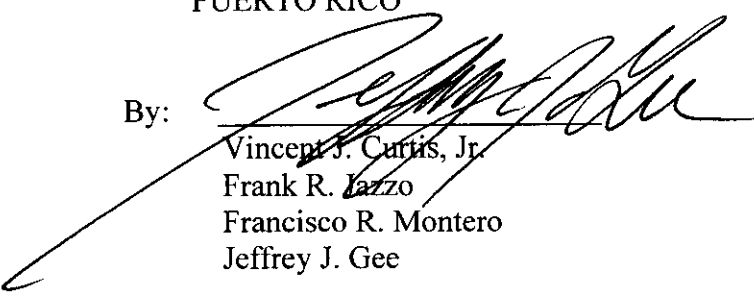
V. Conclusion

In the recent LPFM proceeding, the Commission correctly rejected both the placement of low power stations on the AM band and the creation of a commercial low power service. The Petition has not provided any reason to revisit these decisions. The creation of a commercial LPAM service would create enormous new burdens without any offsetting benefits. In addition, as demonstrated herein, the Petition's proposals for licensing the new commercial service are unlawful and unworkable. Finally, the introduction of more stations into the AM band would only undermine the Commission's ongoing efforts to improve service in the AM band. For these reasons and those described above, we urge the Commission to dismiss the Petition.

Respectfully Submitted,

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³⁵ LPFM NPRM at 2478.

CERTIFICATE OF SERVICE

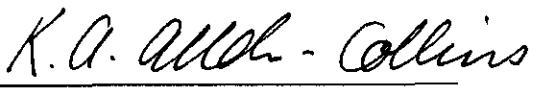
I, Kerry Anne Alden-Collins, a secretary in the law firm of Fletcher, Heald & Hildreth, PLC, do hereby certify that a true copy of the foregoing "Comments of the Alaska Broadcasters Association, the Mississippi Association of Broadcasters, and the Radio Broadcasters Association of Puerto Rico" was mailed, postage prepaid, this 21st day of November, 2005, to the following:

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